REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 130 & 135 OF 2010

GERALD GICHOHI WAMBUGU .....1ST APPLICANT

JULIUS MUROKI KIMATHI ….....2ND APPLICANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence in criminal case Number 2411 of 2008 in the Chief Magistrate's Court at Makadara – Mr. M. M. Muya (CM) on 4th March 2010)

JUDGMENT

Introduction

1. The appellant **Gerald Gichohi Wambugu** and **Julius Muroki Kimathi** were charged with the offence of robbery with violence Contrary to **Section 296(2) of the Pena Code.** At the close of the trial the appellants were convicted and sentenced to suffer death as provided by law. They immediately filed **appeals No. 130** and **135** of **2010** respectively, which were subsequently consolidated into **appeal No. 130** of **2010.**

Facts of The Charge

2. The brief facts were that on the 26th day of June 2008 at around 4.00 p.m. at Eastleigh Section III within Nairobi area, jointly with another not before court while armed with offensive weapons namely: Iron Bars and wood, they robbed Job Longida of cash Kshs.20,000 and a mobile phone make Nokia 1650 valued at Kshs.3,099, altogether valued at Kshs.23,099 and at, or immediately before, or immediately after the time of such robbery they used actual violence against the said Job Longida.

Grounds of Appeal

3. Learned counsel Ms. Rashid appeared for both appellants and written submission in which she amalgamated their grounds of appeal and urged them together. She submitted that the circumstances at the locus in quo were not conducive for positive identification, more so when the trial court relied on the evidence of a single identifying witness. She also contended that the trial magistrate shifted the burden of proof onto the 1st appellant by stating that he failed to ask questions as regards a grudge between him and the 1st appellant who was later acquitted. She

further argued that the trial court misdirected itself when it acquitted the 1st accused person and commented that he ought to have been treated as a witness since this was contrary to the evidence adduced. She prayed that the appeal be allowed.

Response to Grounds of Appeal

4. The state opposed the appeal through learned counsel Miss Njuguna. who submitted that there was overwhelming evidence on record to uphold both conviction and sentence. She argued that on identification, the attack occurred during the day and that the complainant struggled with his attackers and identified that the 1st appellant was the one who held him by the neck while the 2nd appellant held his legs. Further that during the struggle the complainant bit the 1st appellant's hand and he showed the court the bite marks on the appellant's hand during the trial.

5. Miss Njuguna argued that the court did warn itself on the dangers inherent in single witness testimony but found that the circumstances were very clear and that the complainant clearly identified the appellants. She also submitted that whereas the 2nd appellant stated that **Section 200(3)** of the **Criminal Procedure Code** was not complied with, the record shows that a new magistrate took over after the complainant had testified, but that the case begun *de novo.* She therefore urged the court to dismiss the appeal and uphold both the conviction and sentence.

Summary of Case

6. For better understanding of the evidence which we were called upon to scrutinize and re-evaluate, we set out a brief summary of the case as presented to the trial court. The prosecution's case was that **PW1** had come from the bank and was crossing the road at about 4.00 p.m. on 26th June 2008 when he was suddenly hit from behind. He then felt somebody grab him by the neck while another held him by the legs. PW1 testified that he tried to bite one of them so as to loosen the grip they had on him but that person applied force and fractured his collar bone. In the struggle he fell down and was pinned on the ground as his money Kshs.20,000/= and a mobile phone were stolen.
7. Afterwards he went and reported the matter at Biafra Administration Police Lines and was treated at Armed Forces Memorial hospital where an X-ray examination revealed the fracture of the collarbone. On 29th June 2009 he got information that the suspects had been arrested. He went to the Administration Police Camp where he was shown a mobile phone which he identified as his. At the Police Station he was shown the 1st accused who had been found with the phone. The 1st accused person led the complainant and the police to the 2nd and 3rd appellants, who were also arrested.
8. In their defence both appellants gave unsworn statements and called no witnesses. The 2nd appellant told the court that the 1st accused had a grudge against him as a result of misunderstandings over a woman and that was the reason why he implicated him in the case of robbery. The 3rd appellant told the court that on the material day he was unwell and was resting beside the road, when the police came and arrested him and later charged him with this offence. Both appellants denied any involvement in the offence with which they were charged.

Analysis of the Evidence

9. **As we re-evaluated the evidence we bore in mind that it is the duty of the first appellate court to remember that the parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law, and the court is required to weigh conflicting evidence and draw its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witnesses and to make due allowance in this respect.** See Court of Appeal case of **Gabriel Njoroge v Republic (1982-88) 1 KAR 1134**, to which we were referred by M/s. Rashid

10. A scrutiny of the prosecution case shows that it was based on evidence of visual identification and

we are of the view that this appeal can be determined upon evaluation of the weight of the evidence of identification without more.

11. We therefore, analysed the evidence on record to assess the circumstances under which the appellants were said to have been identified and to also test the evidence of the single identifying witness for error.
12. We guided ourselves by the case of **Wamunga v Republic [1989] KLR 424**, to which we were referred by Ms. Rashid. In the said case the Court of Appeal stated that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification or recognition, were favourable and free from possibility of error before it can safely make it the basis of a conviction.
13. In the present case, it is clear from the record that the attack was sudden, brief and vicious. The complainant testified as follows:

"I felt somebody hit me from behind and grab me by the neck. Another held me by the legs. One of them fractured my collar bone."

On cross-examination by the 2nd appellant the complainant also stated as follows:

"I had fainted and became dizzy. When I came to, I went to report the matter to Biafra Administration Police Post."

14. From the sequence of events the complainant's collar bone was fractured before he was felled. No doubt the ensuing pain is the one that may have caused him to faint and feel dizzy afterwards. When he regained consciousness his assailants were gone and all he did was to go to the police to make his report and to the hospital for treatment. Although the offence occurred in broad day light at 4.00 p.m. therefore, we find that the foregoing conditions do not lend themselves well to positive identification. This is especially so because the complainant was the lone identifying witness and his assailants were strangers to him.
15. The appellants were arrested three days later and the complainant purported to identify them when a person who later became a co-accused led him and the police to the appellants. No identification parade was arranged in their regard for the complainant to pick them out and nothing was recovered from them which could connect them to the offence.
16. We are therefore left with the evidence of the 1st accused only, to link the two appellants to the offence. The probative value to be accorded to his evidence is in question since from the evidence of the complainant the person who led to the arrest of the accused was an accomplice. **Black's Law Dictionary 9th Edition** at page 18 defines an accomplice as,

"1. A person who is in any way involved with another in the commission of a crime, whether as a principal in the first or second degree or as an accessory…"

2. A person who knowingly, voluntarily and intentionally unites with principal offender in committing a crime and thereby becomes punishable for it."

An accomplice witness at page 1740 is defined as:

"A witness who is an accomplice in the crime that the defendant is charged with. A co-defendant cannot be convicted solely on the testimony of an accomplice witness."

17. According to the Court in the case of **Watete v Uganda [2000] EA pg. 559,** an accomplice is a person who has participated in the commission of an offence as a principal or an accessory. The Court added that the clearest case of an accomplice is where a person confesses to the participation in the offence, or has been convicted of the offence, either on his own plea of guilty or on the court finding him guilty after the trial. The Court may also find a person to be an accomplice from the evidence recorded in Court.

18. The appellants were convicted on the evidence of the 1st accused who was co-accused and an accomplice. In the case of **Matheka v Republic [1983] KLR 351**, Todd J stated as follows:

"Evidence given by a co-accused person against another should only be considered if it is evaluated and found believable and if it is corroborated by independent evidence pointing to guilt of the accused person and also if it implicates the person giving it."

In the case before us there was no other independent evidence. Furthermore the giver of the evidence which led to the arrest of the appellant was a co-accused who was subsequently acquitted.

19. For the foregoing reasons we find that this conviction is unsafe and consequently cannot be allowed to stand. We therefore allow the appeal, quash the conviction, and set aside the sentence. We order that the appellants be set at liberty forthwith, unless otherwise lawfully held.

SIGNED DATED and **DELIVERED** in open court this **26th** day of **November 2013.**

MUMBI NGUGI **L. A. ACHODE**

JUDGE **JUDGE**